TABLE OF CONTENTS OF BRIEF

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of The Case	3
A. The Underlying Facts	3
B. The Board's Decision	4
C. The Court of Appeals' Decision	6
Reasons for Granting the Writ	
I. The Court Below Has Decided a Question of General Importance in Conflict with Long-Established Precedent in This Court	7
II. The Court Below Has Substantially Departed from the Established Standards of Judicial Review of Agency Action	18
Conclusion	23
Appendix "A"	1a
Appendix "B"	15a

INDEX OF CITATIONS

CASES:

American Ship Building Co. v. Labor Board, 380 U.S. 300 ..... 12, 22
Burlington Truck Lines v. United States, 371 U.S. 195 21
Carlson v. California, 310 U.S. 106 17
Carpenters' Union v. Labor Board, 357 U.S. 93 22
Construction Laborers v. Curry, 371 U.S. 542 16
Electrical Workers v. Labor Board (General Electric), 366 U.S. 667 ..... 7, 9, 10, 20
Garner v. Teamsters Union, 346 U.S. 485 14
Giboney v. Empire Storage, 336 U.S. 490 17
Houston Contractors Association v. National Labor Relations Board, 386 U.S. 664 ..... 8, 12
In Re Green, 369 U.S. 689 16
Interborough News Company, 90 NLRB 2135 11
Labor Board v. Brown, 380 U.S. 278 ..... 12, 20, 23
Labor Board v. Drivers Union, 362 U.S. 274 ..... 13, 22
Labor Board v. Fruit Packers, 377 U.S. 58 18

Page

Labor Board v. General Drivers Local 968, 225 F. 2d 205 (C.A. 5) 19
Labor Board v. Insurance Agents, 361 U.S. 477 ..12, 20, 22
Labor Board v. Metropolitan Life Insurance Co., 380 U.S. 438 21
Labor Board v. Servette, 377 U.S. 46 13
Liner v. Jafco, Inc., 375 U.S. 301 16
Machinists v. Street, 367 U.S. 740 16
Moore Dry Dock, 92 NLRB 547 .....9, 10, 11
Mountain Pacific Chapter, etc., 119 NLRB 883 .....21, 22
National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665 .....12, 13
Phelps Dodge Corp. v. Labor Board, 313 U.S. 177 21
Pure Oil Company, 84 NLRB 315 11
Schneider v. Irvington, 308 U.S. 141 17
S.E.C. v. Chenery Corp., 318 U.S. 80; 332 U.S. 194 ... 21
Steelworkers v. Labor Board (Carrier), 376 U.S. 492 7, 9, 13
Teamsters Local v. Labor Board, 365 U.S. 667 ....20, 21, 22
Teamsters Union v. Morton, 377 U.S. 252 22
Thornhill v. Alabama, 310 U.S. 88 17
United Association of Journeymen, Local 106, 110 NLRB 206 8
Walker v. Birmingham, 388 U.S. 307 16
Weber v. Anheuser-Busch, 348 U.S. 468 15

CONSTITUTION AND STATUTES

U. S. Constitution:

First Amendment 8, 16, 17, 18

Statutes:

28 U.S.C. § 1254(1) 2
National Labor Relations Act, as amended (49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 29 U.S.C. § 151, *et seq.*):
Section 7 2
Section 8(a)(3) 22
Section 8(b)(4) 4, 9, 12, 13, 14, 15, 16, 22
Section 8(b)(4)(B) 2, 8, 10, 12, 13, 16
Section 10(e) 23
Section 10(l) 4
Section 13 .....13, 16
Section 303 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board, (JA [1] 243-299) including the Intermediate Report of the Trial Examiner is reported at 155 NLRB 402. The opinion of the Court of Appeals for the District of Columbia is reproduced in Appendix A to this petition and is reported at 376 F. 2d 774.

---

[1] "JA" refers to the Joint Appendix in the Court below.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1967. On June 28, 1967, Mr. Justice Brennan granted Petitioner an extension of time for filing a writ of certiorari until August 28, 1967. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[2]

1. May appeals to employees of a secondary employer not to assist in the day-to-day operations of the struck employer be held unlawful under § 8(b)(4)(B) of the National Labor Relations Act because (1) they are made by a "secondary union" and (2) no primary picket line has been established at the situs of the dispute?

2. May a Court of Appeals enforce an order of the National Labor Relations Board, based on a Board-created rule of general application whereby illegality is conclusively presumed from the absence of certain conditions, although the Board has failed to consider whether those conditions are necessary in the case before it?

STATUTE INVOLVED

This case involves §§ 7, 8(b)(4)(B) and 13 of the National Labor Relations Act as amended, 49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 29 U.S.C. § 151 *et seq.* They are reprinted in Appendix "B", p. 15a, *infra*, to this Petition.

---

[2] If certiorari is granted, petitioner reserves the right to argue that the procedures followed by the National Labor Relations Board denied it due process of law.

STATEMENT OF THE CASE

In this case, the Court of Appeals affirmed the decision of a sharply divided National Labor Relations Board, holding that a secondary union may not appeal to its members to withhold those services which aid the normal operations of a struck or primary employer if the primary union fails to or is prevented from establishing a picket line at the situs of the dispute.

A. The Underlying Facts

In 1962, the Seafarers International Union of Canada picketed the ships of Upper Lakes Shipping, Ltd., a Canadian concern, when those ships docked in Chicago and other ports. Members of Locals 101 and 418 of the International Longshoremen Association (ILA), employed by the Continental Grain Company (Continental), a grain shipper with loading facilities on the Chicago docks, refused to load Upper Lakes ships though performing all other duties assigned to them by Continental. JA 27-46. Continental filed secondary boycott charges against the Seafarers International Union of North America (SIU) and Locals 101 and 418, ILA, but the General Counsel of the Labor Board dismissed the charges without issuing complaints. JA 92.

The following year, 1963, Upper Lakes ships were not picketed because the picket line had been removed pursuant to a state court injunction. (JA 290). Continental employees continued to refuse to load Upper Lakes ships though performing all other normal duties. An official of Local 418 advised Continental that there was "an invisible picket line" around Upper Lakes ships. (JA 282). Once again secondary boycott charges were filed, but this time complaints were issued against SIU and Local 418 but not against Local 101.

Following lengthy proceedings under Section 10(l) of the Act, Upper Lakes ships were loaded. The complaint did not allege and the Board did not find that any member of Local 418, Petitioner herein, refused to perform any services except those connected with the normal operations of Upper Lakes ships, the struck employer. (JA 227).

B. The Board's Decision

Although recognizing the right of both primary and secondary unions "to appeal to employees approaching struck 'ambulatory' premises to refrain from entering those premises", (JA 290), a majority of the Board held that no such right exists in the absence of picketing by the primary union. (JA 288). The majority held, that since there was no picket line, (picketing having been enjoined by a state court) Local 418 had violated Section 8(b)(4) by inducing its members to withhold services which aided the normal operations of Upper Lakes.[3] Though admitting that there was an "appearance of logic" in the ILA's contentions that (1) limited appeals to secondary employees of the type allegedly made here are permissible and (2) no legal significance may attach to the fact that the appeals were made by a secondary rather than a primary union, the majority held:

> ". . . at least in a case such as this one, where the labor dispute is between a primary employer with an ambulatory situs and a union other than the one which seeks to induce secondary employees

[3] The charges against the SIU were dismissed since the International, respondent before the Board, was not proven responsible for the acts of its subordinate bodies. (JA 280-281).

> to take action because of that dispute, there must be some clear and contemporaneous notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer. Unless such notice is given, the dispute takes on the appearance and character of a dispute between the "inducing" union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer." (JA 288)

In a vigorous dissent, Members Brown and Jenkins attacked the majority's "willingness to attach controlling significance to the absence of actual picketing at the situs in distinguishing lawful primary and unlawful secondary activity." JA 297. Rebutting the majority's view that the absence of picketing created the "possibility" that Continental would become completely enmeshed in a labor dispute not of its own making, the dissenters pointed out that *in fact* Continental's employees had loaded grain on ships owned by all companies other than Upper Lakes. JA 296. According to the dissenters ". . . the simple answer to the majority's contention is that the record evidence refutes it here. For SIU, Canada, did not induce Continental's employees to engage in a general strike against their own employer; nor did Continental's employees refuse to load grain on ships owned by companies other than Upper Lakes. In essence, then, Continental was not enmeshed in the instant dispute to any greater extent than if SIU, Canada, had maintained a lawful picket line around the SS *Shaw* which resulted in a refusal by Continental's employees to load grain on that ship. Indeed, it can be persuasively

argued that the absence of a picket line here afforded Continental, a neutral, greater protection—it removed the possibility that various third parties arriving at the situs to do business with Continental (unrelated to loading Upper Lakes' ships) might refrain from doing so upon observing a picket line around the struck ship." (JA 296-297.)

C. The Court of Appeals' Decision

The Court of Appeals affirmed, holding that the Board is not precluded from banning "non-picketing appeals merely because the resulting secondary impact may be no different from that which may ensue from permissible picketing appeals. In short, Congressional approval of a union's use of a particular time-honored means, notwithstanding possibility of certain practical consequences, does not constitute a warrant to reach for the same or equivalent consequences regardless of means used." (P. 10a, *infra*.) The Court held that the Board has administrative latitude to establish a general rule basing legality upon the means of communication adopted by the union, and that the Board's requirement of on the scene picketing in order to provide notice to third parties of the nature of the dispute does not exceed that latitude. Though terming "unfortunate" the Board's failure to discuss the fact that all parties involved here had notice in fact of the nature of the dispute despite the lack of picketing and that the work stoppages were confined to operations impinging on Upper Lakes, the Court excused this omission:

> "The Board could properly adopt a rule that would assure general and adequate notice, and avoid a doctrine that would require it to determine in each case all the employees that might have occasion to visit the plant and whether they do or would

have adequate notice of the labor situation. It seems to us permissible for an agency—like a legislature or court—to devise a rule setting forth certain conditions or requirements on the ground that these will be necessary in most instances to achieve a desired goal, without having to consider for every single situation whether they are necessary for that case." (p. 13a, *infra.*)

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided a Question of General Importance in Conflict With Long-Established Precedent in This Court

The refusal of the longshoremen to load the *S.S. Shaw* was a refusal by employees of a secondary employer to perform tasks which aided the primary employer's everyday operations. This Court has held that union appeals to secondary employees to withhold such services are lawful. *Electrical Workers* v. *Labor Board (General Electric)*, 366 U.S. 667, 680-681; *Steelworkers* v. *Labor Board (Carrier)*, 376 U.S. 492, 498. Nevertheless, the Court below has sustained the decision of a divided Board that petitioner had violated the Act because of two circumstances: 1) The appeals not to perform the work were made by a union other than that which represented the employees of the struck primary employer; and 2) The striking union did not establish a picket line at the situs of the dispute. The Board and the Court below have thus imported into this critical and much litigated area of labor relations —that of the permissible range of economic activity where the operations of two employers (and their employees) interact—two novel elements which are without foundation in either the language or the objectives of the Act. Review by this Court is necessary since neither of these requirements is consistent with the

holdings of this Court, and since the Board majority has enunciated in this case a broad rule of general application predicated upon these novel requirements which will have fundamental and far-reaching importance to labor management relations.

The imposition of special limitations on the activities of what were called below "secondary unions" has since been explicitly rejected by this Court and would therefore, even if it stood alone, warrant reversal of the judgment below. The further holding that the presence of a picket line is necessary to validate a refusal of the secondary employer's employees to aid in the day-to-day operations of the primary employer not only distorts the statute, but also raises serious questions of federalism and under the First Amendment.

1) It was held below that the appeals were unlawful because they were made by the ILA, rather than by the SIU which represented the employees of the primary employer. Shortly after the decision below issued, this Court held that the legality or illegality of union conduct under § 8(b)(4)(B) cannot turn on the identity of the union whose members refused to perform services in aid of the primary employer. *Houston Contractors Association* v. *National Labor Relations Board,* 386 U.S. 664. The Court quoted with approval an earlier decision of the Board which stated the correct rule:

> "Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union."[4]

[4] *United Association of Journeymen, Local 106 (Columbia-Southern Chemical Corporation),* 110 NLRB 206, 209, quoted at 386 U.S. 668.

This rule is in accord with the *General Electric* and *Carrier* cases which teach that the primary or secondary character of appeals to engage in refusals to perform work depends exclusively on the "type of work" being performed by the secondary employees. *Electrical Workers* v. *Labor Board,* 366 U.S. 667, 680-681; *Steelworkers* v. *Labor Board,* 376 U.S. 492, 497. Where, as here, the only "type of work" withheld is that which aids the normal operations of the primary employer, the pressure is primary, not secondary. That one source of this pressure against the primary employer is a "secondary union" is wholly irrelevant. The judgment below thus rests upon a distinction which has no foundation in the statutory language and which has now been thoroughly discredited by this Court. It should not be allowed to stand.

2) The second factor relied on below to establish a violation—the *absence* of a picket line—simply stands the law of secondary boycotts on its head. Since § 8 (b)(4) was originally enacted in 1947, countless cases have sought to achieve a balance between the right of employees to engage in concerted activity against a struck employer and the prohibition against enmeshing the neutral employer. These problems have been recognized as being particularly acute when a picket line is established at a situs common to both. Since the earliest decisions under Taft-Hartley, the Board has frequently expressed concern that picketing, unlike other methods of appeal, has the potential of widening labor disputes unjustifiably by instigating general work stoppage by secondary employees. In the landmark *Moore Dry Dock* decision itself, the Board made absolutely clear that oral appeals to secondary employees to withhold only those services that aided the

primary employer were permissible, while deciding picketing must be conducted under carefully circumscribed conditions in order to minimize the danger of total work stoppages by secondary employees. Yet, in the instant case, the picket line, far from being a source of special concern, is viewed as a saving grace, an indispensable pre-condition to the otherwise lawful refusal of secondary employees to assist the day-to-day operations of the primary employer.

The Board did not purport to find justification for this paradoxical result in the language of § 8(b)(4)(B). Instead, it stated that the picket line is necessary because, "there must be some clear and contemporary notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer". JA 288. This reasoning is on its face fallacious, since violations of § 8(b)(4) depend not on the "appearance and character" of the dispute but on the means and objectives of the union. *General Electric, supra,* 366 U.S. at 672-673, and cases cited at p. 22, n. 11, *infra.* There is nothing in the text of the statute which requires that notice be given of the scope of the dispute. Rather, that requirement was developed in *Moore Dry Dock,* 92 NLRB 547 and subsequent cases to protect neutral employers from a general strike which might result from the inherent ambiguity of picket line appeals at a common situs. Now, the notice which had been deemed necessary to protect against the potentially impermissible broadening of the dispute by the presence of a picket line is suddenly regarded as an end in itself, and picketing is mandated as a prerequisite for other methods of appeal which themselves do not create similar hazards

of enmeshing the neutral employer in a controversy not his own. It will seem ironic to anyone familiar with the history of the problem that the result in this case should be thought to be compelled by the *Moore Dry Dock* decision.[5] Yet, this is precisely what the Board said:

> "The underlying considerations that lead the Board in ambulatory situs situations to infer an unlawful objective when picketing deviates from *Moore Dry Dock* standards also dictate a like inference where pressures are exerted against the neutral employees by a secondary union in the absence of a picket line directed at the primary employer while this situs of the dispute is lodged at the neutral premises. A failure to draw an inference of illegality in such circumstances would give, it seems to us, greater freedom to secondary unions to disrupt the business of the neutral employer whose premises temporarily house the primary ambulatory situs, than is given under our *Moore Dry Dock* tests to the primary union directly involved."

We submit that the Board is without power, in the guise of drawing inferences or otherwise, to predicate

---

[5] The irony is heightened by the fact that in *Moore Dry Dock* itself there were numerous non-picketing appeals to employees. In holding these to be lawful, the Board did not rely on the existence of primary picketing. Rather, the Board decided that because they "invited action only at the *situs* of dispute * * * they must be considered as primary action." 92 NLRB at 551-552. This principle had been established in *Pure Oil Company*, 84 NLRB 315 and reaffirmed in *Interborough News Company*, 90 NLRB 2135, where it was held that "the *Pure Oil* principle does not turn on the existence of picketing. What is made controlling in that case is that the action induced and encouraged was confined to a refusal to perform services *only* at the premises of the primary employer—and that precisely was the situation here." (*Id.* at 2150, emphasis in original.) It is precisely the situation in the present case as well.

illegality under § 8(b)(4) on the basis of its view of the proper balance of the rights of primary and secondary unions, for this is not the test established by Congress. *Houston Contractors* v. *Labor Board,* 386 U.S. 684; *Cf. Labor Board* v. *Insurance Agents,* 361 U.S. 477, 497-498; *Labor Board* v. *Brown,* 380 U.S. 278, 283, 290-292; *American Ship Building Co.* v. *Labor Board,* 380 U.S. 300, 315-318. Moreover, as the facts of this case demonstrate, the Board is plainly wrong in its minor premise that there is a greater disruption of the neutral employer's business in the absence of a picket line. In either event the scope of lawful disruption attendant upon a primary strike is the same—all employees are free to withhold their services from the primary employer's normal day-to-day operations. The non-existence of a picket line neither aggravates that disruption nor deprives it of its character of primary activity.

The Court of Appeals recognized that the impact on the neutral employer was no greater than it would have been if a primary picket line had been established. But it concluded "that the Board is not directed by the statute to permit non-picketing appeals merely because the resulting secondary impact may be no different from that which may ensue from permissible picketing appeals." (P. 10a *infra.*) This conclusion was based on the Court's view that primary picketing is accorded special protection under the Act by virtue of the proviso to § 8(b)(4)(B) which was enacted in 1959. The Court correctly understood the proviso to have preserved the central holding of *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U.S. 665, at the same time that one aspect of that decision was being overturned by the

removal of the word "concerted" from the inducement clause of § 8(b)(4). See *Labor Board* v. *Servette,* 377 U.S. 46, 52. However, the Court misconceived the *Rice Milling* Case, which was based not on the special status of picketing, but rather on § 13 of the Act which "made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act." 341 U.S. 665 at 673. Thus, protection was given to picketing in order to effectuate the Congressional objective to preserve the primary strike weapon, of which primary picketing is but one important aspect. *Cf. Labor Board* v. *Drivers Union,* 362 U.S. 274, 281-282. This was confirmed by the proviso to § 8(b)(4)(B), whose language protects "primary strikes" no less than "primary picketing." This Court squarely held in *Carrier* that "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer." 376 U.S. at 499. Yet, the Court of Appeals treated the proviso not as declaratory of prior law, as Congress intended, but as a limitation of the normal incidents of all primary strikes by confining them to strikes which are attended by primary picketing. All the possible consequences of this novel interpretation cannot now be foreseen, but two are inevitable: 1) unions will be given additional incentive to post pickets at the primary situs, thereby increasing the risk that neutral employers will become involved in the dispute, as the Board dissenters recognized (JA 296-297), and contrary to the central purpose of § 8(b)(4); 2) wherever

the striking union does not or cannot engage in primary picketing, the right of unions and their members to undertake activity protected by § 13 and the proviso to § 8(b)(4)(B) will be severely inhibited, further upsetting the balance of forces prescribed by Congress.

The circumstance which disabled the SIU from picketing, and which ultimately resulted in Petitioner's liability under the Board's theory, was an injunction issued by an Illinois court. This points up a separate and substantial ground for review here. For the effect of the Board's new rule is to subvert the uniformity of regulation which the Act mandates. Notwithstanding the exclusive responsibility placed upon it by the Congress, the Board has ceded to state courts the decisive voice in determining legality of union activity under § 8(b)(4). Indeed, the Board asserted as a reason for its rule the need to preserve the efficacy of such state court injunctions.[8] But the Board is not charged with preventing evasion of the "effects" of state injunctions. Its exclusive responsibility is to determine the respective rights and duties of employers, employees and labor organizations under the National Labor Relations Act on the basis of standards prescribed by Congress. The Board's abdication of this function under the rule announced in this case subordinates federal law to the vagaries of state law despite the Congressional desire for uniformity consistently recognized by this Court since *Garner* v.

---

[8] "Moreover, to permit such conduct on the theory that a 'phantom' or 'invisible' picket line is to be presumed even though there is no picket line in fact, would provide a ready device for evading the effects of an injunction prohibiting picketing that might be obtained against the primary union." JA 290.

Teamsters Union, 346 U.S. 485 and *Weber* v. *Anheuser-Busch*, 348 U.S. 468.[7]

Moreover, the decision below will encourage employers to seek state court injunctions against peaceful picketing in labor disputes affecting commerce in the hope that they may thereby obtain immunity from otherwise permissible primary activity. There is all too much evidence that state courts remain receptive to requests for injunctions in labor disputes, a tendency which can only be aggravated by the critical significance the decision below places on such injunctions. The decision below thus has a potentially devastating effect on the right to engage in primary strike activity

---

[7] In evaluating the propriety of granting review of the decision below it seems highly significant that it would make it possible for every maritime state in this country to be operating under different Federal law of permissible strike activity. For example, let us assume that a ship docks to pick up grain at several ports, e.g., Chicago, Milwaukee, Toledo and Buffalo. In every instance the members of the Local ILA Union at the particular port refuse to board the ship because they are in sympathy with SIU in its dispute with the ship. In Chicago, an Illinois court enjoins all picketing. In Milwaukee the SIU persuades the court to allow a single picket. In Toledo the Ohio court denies the petition for an injunction entirely because of some novel Ohio doctrine of law. In Buffalo the employer secures the injunction banning all picketing but it is later reversed by a New York appellate court. Under the Board's majority position, *for engaging in identical conduct within the confines of the United States*, the Chicago local Union has violated Section 8(b)(4); the Milwaukee local's conduct is lawful because its attorney's efforts retained a solitary picket; the Toledo local's conduct is lawful because it is the beneficiary of a novel doctrine of Ohio law; the Buffalo union engaged in illegal conduct when its members refused to board the ship. Would the subsequent reversal of the injunction order require the Board to treat the New York longshoremen's actions as having been lawful by deeming the picket line to have been present even though in fact there was no picketing?

protected by § 13 and reaffirmed by the proviso to § 8 (b)(4)(B). This impact will not be alleviated by the fact that most of these injunctions are theoretically subject to reversal under the preemption doctrine.[8] Incredibly, the Board did not even inquire whether the injunction to which it accommodated its interpretation of § 8(b)(4)(B) was consistent with the National Labor Relations Act. Nor, in light of *Walker* v. *Birmingham*, 388 U.S. 307, can unions safely rely on *In Re Green*, 369 U.S. 689, to disobey an unconstitutional injunction. In short, unless the decision below is reversed, federally created rights will be subject to destruction by state court injunctions issued in disobedience to federal law. Even where the state courts act properly, the congressional desire for uniformity will be thwarted by predicating legality under § 8 (b)(4) upon the availability of state court injunctions. Only this Court can restore the balance of federalism which the National Labor Relations Act and, in the final analysis, the Supremacy Clause command.

The Board's construction of § 8(b)(4) requires review on the additional ground that it raises serious questions under the First Amendment. Cf. *Machinists* v. *Street*, 367 U.S. 740. It was acknowledged below that if the SIU had engaged in primary picketing, the ILA's appeals to its members and their subsequent refusals to aid the Continental's day-to-day operations would have been lawful. (See pp. 5a-7a, *infra*.) Under such circumstances, Government agencies cannot, consistent with the First Amendment, mandate the use of one form of expression in preference to another. By

---

[8] As has long been recognized, the granting of an injunction often terminates a labor dispute. *Construction Laborers* v. *Curry*, 371 U.S. 542, 550; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 307-308.

prohibiting oral appeals to employees not to perform certain services, while permitting identical appeals by picketing at the situs, the Board's interpretation transgresses the First Amendment. It has been squarely held that " * * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *Irvington,* 308 U.S. 141, 163.

Despite the many cases that have followed, this Court's statement in *Thornhill* v. *Alabama,* 310 U.S. 88, 102, that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . .," remains the law. That freedom is not without qualification, as where the utterances are part of an "integrated course of conduct" in violation of law, *Giboney* v. *Empire Storage,* 336 U.S. 490, 498 or where attended by violence, *Thornhill* v. *Alabama, supra,* at page 105. But where the utterance itself is lawful and is made peacefully, First Amendment guarantees attach. As was held in *Carlson* v. *California,* 310 U.S. 106, 112:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra,* publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." (citations omitted)

Justice Black has recently stated in a similar situation, ". . . it is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment." *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 78 (concurring opinion). He rejected the view that one form of speech can be restricted because other methods of communication are left open. "This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken by degrees than by one fell swoop." 377 U.S. at 79-80. Here the Board has established a rule predicating legality on the mode of communication and not on any invitation of illegal conduct. The Act does not authorize, and the Constitution forbids, such a rule.

II. The Court Below Has Substantially Departed From the Established Standards of Judicial Review of Agency Action

We have thus far urged that *certiorari* be granted because the rule of law established by the Board and approved below is contrary to this Court's decisions and undermines the policies of the Act. An additional compelling ground for review is presented by the *method* of decision, that is, the establishment of a *per se* rule of illegality, and its application in this case. We submit that in sustaining the Board's order, the Court of Appeals has so far departed from long established standards of judicial review of agency action as to call for the exercise of this Court's supervisory powers over the lower Federal courts.

As we have seen, the theory underlying the rule established by the Board in this case is that unless clear and contemporary notice is given by the striking union that the dispute is between it and the primary employer, "the dispute takes on the appearance and character of a dispute between the 'inducing' union and the neutral employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and the primary employer." For this reason, the Board holds that in the absence of such clear and contemporary notice, it will conclusively infer an unlawful objective on the part of a union inducing strike action at the primary situs, at least if the inducement is by a "secondary union". As the facts of this case show, and as the Board and the Court of Appeals acknowledged, this inference cannot be rebutted by a showing that the only activity invited or engaged in is a refusal to aid the primary employer in his day-to-day operations, which would concededly be protected activity if a primary picket were present. But the Board may not substitute, "inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements * * *" *Labor Board* v. *General Drivers Local 968*, 225 F. 2d 205, 209. By sustaining an order which rested only upon an inference of illegality rather than "substantial evidence that the unlawful objective denounced by the statute actually existed" (*id.*), the Court below adopted a standard of review that is contrary not only to that proclaimed by Judge Rives for the Fifth Circuit in

the cited case, but, also of course, to the decisions of this Court. See, e.g. *General Electric, supra,* 366 U.S. 667 at 672-674 and 677; *Labor Board* v. *Insurance Agents,* 361 U.S. 477, particularly at 482-484, nn. 4 and 5; *Teamsters Local* v. *Labor Board,* 365 U.S. 667; *Labor Board* v. *Brown,* 380 U.S. 278. In *Brown,* this Court concluded, in language that precisely fits the present case, "Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent." Id. at 292.

The Court further misconceived its function by holding that the Board could properly adopt a rule requiring notice and yet find a violation without determining whether notice actually existed. For, as petitioners urged, and the Court acknowledged:

> "* * * although there was no notice by virtue of picketing on the scene, there was notice in fact to all parties concerned that Upper Lakes and not Continental was the target of the work stoppages; and the work stoppage that actually resulted was confined to operations impinging on Upper Lakes." p. 12a, *infra.*

The Court of Appeals declared, with considerable justification, that "It is unfortunate that the Board's opinion does not expressly deal with petitioner's point." p. 12a. Nevertheless, it enforced the Board's order. The Court thought that "a fair reading of the opinion reveals that the Board evolved a general requirement in terms of likelihood of providing adequate notice, intending it to apply without regard to whether the particular case reflected actual notice provided in some

other way." p. 12a-13a, *infra*.[9] This process of decision was justified by the Court of Appeals by resort to a novel and exaggerated conception of agency authority:

> "It seems to us permissible for an agency—like a legislature or court—to devise a rule setting forth certain conditions or requirements on the ground that these will be necessary in most instances to achieve a desired goal, without having to consider for every single situation whether they are necessary for that case." p. 13a, *infra*.

When the Board previously asserted power to establish a rule of the precise character envisioned by the Court of Appeals in the quoted passage, this Court disabused the Board of its pretentions to legislative powers. *Teamsters Local* v. *Labor Board*, 365 U.S. 667.[10]

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which

---

[9] Perhaps a more accurate, albeit less charitable reading of its opinion would be that the Board simply failed to reconcile its rule of law with the facts in this case. In any event, it was not appropriate for the Court below to speculate what the Board meant on an issue which the Court acknowledged to be "of obvious importance". p. 12a, *infra*.

"For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169. See also *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197; *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94; 332 U.S. 194, 196; *Labor Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-444.

[10] In *Mountain Pacific Chapter*, 119 NLRB 883, the Board devised three conditions for the lawful operation of exclusive hiring halls. The Board asserted that in the absence of these "protective provisions", there was a considerable likelihood that exclusive hiring halls would be used to discriminate to encourage union membership

results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building* v. *Labor Board,* 380 U.S. 300, 318.

The policy decisions governing the present case have already been made by the legislature. "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions." *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 498, referring to § 8(b)(4) of the Act, and quoted with approval in *Labor Board* v. *Drivers Local Union,* 362 U.S. 274 at 282-283. Section 8(b)(4) "comprehensively and with great particularity 'circumscribes and condemns specific union conduct directed to specific objectives' ".[11]

The National Labor Relations Board has created a rule of law which substitutes a conclusive presumption of illegality from failure to comply with certain Board-ordained conditions for record evidence of the elements of the offense defined by Congress. The Court of Appeals has endorsed this rule, and enforced an order based upon it, although it conceded that the

---

in violation of § 8(a)(3). The Board held that it would find a violation of the Act whenever these three conditions were not met, even if there was no showing that they were necessary to prevent actual discrimination in a given case. When the legality of the *Mountain Pacific* standards came before this Court in *Teamsters Local* v. *Labor Board,* 365 U.S. 667, this Court expressly disapproved them. The Court did not allow the Board to substitute its rule for the finding of discrimination which Congress had made the statutory test. "If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it." 365 U.S. at 677.

[11] *Teamsters Union* v. *Morton,* 377 U.S. 252, 258, quoting *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 98.

Board failed to consider whether the asserted reason for the rule is present in this case. The Court has thus condoned illegal and arbitrary action by the Board, in derogation of its own responsibilities under § 10(e) of the Act. *Labor Board* v. *Brown,* 380 U.S. 278, 290-292. Even more significantly, the Court has enunciated a principle of general application which equates the powers of the Congress and administrative agencies and drastically attenuates the obligation of the judiciary to confine the agencies to their assigned roles and to assure consistency with the statutory mandate. Since the judgment below unavoidably rests on this far-reaching and dangerous doctrine, review by this Court is necessary to restore the hitherto accepted relationship between Congress, administrative agencies and the courts.

CONCLUSION

By reason of the foregoing, this Petition for Certiorari should be granted.

Respectfully submitted,

HENRY KAISER
GEORGE KAUFMANN
RONALD ROSENBERG
1730 K Street, N. W.
Washington, D. C. 20006

IRVING M. FRIEDMAN
HAROLD A. KATZ
7 South Dearborn Street,
Chicago, Illinois 60603

Attorneys for Petitioner.